Case Number: 3316461/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss R Smith	**v**	Greatwell Homes Limited

Heard at: Cambridge **On:** 12th-15th June 2023

Before: Employment Judge R Wood; Mr C Grant; Mr J Vaghela

Appearances
For the Claimant: Mr M Magee (Counsel)
For the Respondent: Mr Sheehan (Counsel)

JUDGMENT

1. The Claimant was treated less favourably by the respondent on the grounds that she was on maternity leave at the relevant time contrary to section 18 of the Equality Act 2010 ("EA").

2. The claimant suffered a detriment on the grounds that she was on maternity leave at the relevant time contrary to section 47(C) of the ERA.

3. Upon agreement between the parties, the respondent must pay to the claimant the sum of £50,000 in total in respect of the above matters.

REASONS

Claims and Issues

1. The Claimant alleged that she had been unfavourably treated on the grounds that she was on maternity leave at the relevant time contrary to section 18 of the EA. Further she alleged that she suffered a detriment for similar reasons contrary to section 47(C) of the ERA. In essence, she asserts that the respondent failed to communicate important information to

her during her maternity leave. This included job opportunities and changes to the way the work place was organised.

2. The respondent denies the claims. It now accepts that it failed to notify the claimant about job vacancies within the company whilst she was away from work. However, it denies the other alleged failures. Further, it does not accept that any of the alleged failures to act constituted less favourable treatment, or a detriment. Further, and in any event, none of the aforesaid matters occurred because the claimant was on maternity leave. In particular, the respondent alleges that any failures to act were a mistake, the result of changes to the way in which staff were notified of job vacancies.

Procedure, Documents and Evidence Heard

3. The Hearing took place on 12th-15th June 2023. The claim was heard by way of a face to face hearing at the Employment Tribunal in Cambridge. We first of all heard testimony from the claimant, Miss Smith. We also heard evidence from witness from the respondent, Greatwell Homes Limited. In particular, we heard from Mr Ben Wilessmith (Head of Corporate Services); and Ms Loreen Herzig (Head of Property Services and Compliance). Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 338 pages. We also heard helpful submissions from Mr Magee and Mr Sheehan, who both provided written submissions.

4. In coming to our decision, the panel had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

5. The relevant legislation in respect of the allegations of direct discrimination is contained in the Equality Act 2010 (“the Act”).

6. Pregnancy and maternity are protected characteristics. Section 18 concerns pregnancy and maternity discrimination in the employment context. It provides that an employer discriminates against a woman if it treats her unfavourably:

    - during the ‘protected period’ of her pregnancy because of the pregnancy or an illness resulting from the pregnancy (s.18(2))

    - because she is on compulsory maternity leave (s.18(3)), or

    - because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave (s.18(4))

7. Section 47C of the Act relates to the right not to suffer a detriment in respect of various types of family leave contained in the section. It applies

regardless of an employee's length of service or hours of work. It provides that an employee has the right 'not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer' done for a prescribed reason. A prescribed reason is one which is prescribed in regulations and must relate to one of the matters listed section 47C(2), including pregnancy, childbirth or maternity.

8. Section 136 of the Act provides that:

> "*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".*

This provision reverses the burden of proof if there is a prima facie case of direct discrimination.

9. In addition to the statutory provisions, Employment Tribunals are obliged to take into account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

10. The application of the aforesaid principles was summarised by the Employment Appeal Tribunal in *London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08*, which stated as follows:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

(d) The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.

(f) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as she was. However, as the EAT noted (in *Ladele*) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

Findings

11. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

12. The claimant began working for the respondent in March 2019 as a business improvement analyst within the business improvement team. There were only three people in that team: the claimant, a business improvement

manager, and a head of business intelligence. The person occupying the post of business improvement manager had been absent due to long term ill health from August 2019. She never returned to work and resigned in early 2020.

13. The claimant had a heavy work load from the start. Her post had been vacant prior to her recruitment,. There was a significant back log of work which the claimant was required to work through. On her own admission, the claimant found this challenging. Further, she was required to act up up in respect of some roles done previously by her line manager, the business improvement manager. It has been difficult to assess the precise proportion of her manager's job description that the claimant was required to perform. Miss Herzig suggested it was about 20%. The effect of the claimant's evidence was that it was more than this. The Tribunal is satisfied that it was a significant proportion of the line manager's role.

14. We also found that, as a result, Miss Herzig encouraged the claimant to apply for a more senior post with line management responsibilities should one become available and created an expectation in the mind of the claimant that she would be a strong candidate for such a position. Miss Herzig regarded her as a valuable and ambitious member of staff. Of course, this was before the claimant informed the respondent that she was pregnant. This occurred in April 2020 when the claimant told Miss Herzig.

15. This was a difficult period for the claimant. She was coping with a heavy workload as described above. It was a busy time, being the end of the respondent's financial year. She was pregnant, and had a toddler at home on a full time basis as the nurseries were closed due to the Covid pandemic. She had considered resigning her employment during this period such was the pressure upon her.

16. We found that the message that the claimant was pregnant was not effectively communicated to human resources by Miss Herzig. The claimant was required to confirm with human resources that she was expecting on a further two occasions. We find that this was symptomatic of the respondent's attitude towards the claimant and/or to the fact she was pregnancy.

17. In April 2020, the claimant was excluded from the offer of 'a free' day off, made by the respondent to all staff as a good will gesture during the problems created by Covid. The day off was to be a Friday. The claimant was not able to enjoy the day off because she did not work on Fridays. Although the claimant raised the issue, the respondent refused to reconsider its decision i.e. the scope of the offer. The tribunal view this as a further indication of the respondent's general approach to diversity issues. It was, in our view, a decision which was unfavourable towards part time workers, and therefore indirectly discriminatory towards female members of staff, as well as deeply unsympathetic in relation to the claimant herself.

18. The claimant commenced her maternity leave in early September 2020. It was her intention to take the full 12 months of leave. However, we accept that the claimant was prepared, had the circumstances been appropriate, to return to work at an earlier date. We accept her evidence on this point. It was our impression that she was, in this regard and all others, a thoughtful and reasonably witness. We found her to be a credible and consistent witness who was prepared to concede parts of her claim, and criticisms made of her, when it was appropriate to do so. We noted that it is not uncommon for women to return early from maternity leave, should the circumstances require.

19. We did not take the same view of the witnesses we heard for the respondent. They were inconsistent, vague and sometimes evasive. It was our impression that they were not always attempting to be straightforward with the Tribunal. It was an aspect of their evidence that they sought to distance themselves from responsibility for the matter alleged at the expense of the human resources department. We did not find this an attractive approach.

20. Although the respondent made an admission at the hearing that it had not complied with it obligations under clause 8.3 of its own maternity policy, this stood in stark contrast with the respondent's, and the witnesses, approach prior to the hearing. Throughout the grievance brought by the claimant, and in their witness statements, neither Miss Herzig nor Mr Wilesmith appeared to accept any fault. In fact, in their own ways, they both sought to point the finger at the claimant. For instance, Mr Wilesmith characterised what happened as a misunderstanding on the claimant's part, without reference to the maternity policy at all. Miss Herzig, for her part, wrongly minimised any suggestion that the claimant had acted up in the material role prior to her maternity leave. Neither was an impressive witness. Neither demonstrated sufficient knowledge, skills or empathy in the way they dealt with the claimant throughout this process. It was the Tribunal's view that both were ill equipped to deal with equality and diversity issues. It is incumbent on an employer to make sure that appropriately skilled and experienced staff deal with equality and diversity issues. The respondent had singular failed in this regard.

21. To return to the chronology of the matters, save for a few emails from human resources about pension related matters, and some personal messages from Miss Herzig (with whom she had had a friendly relationship), there was no contact between the claimant and the respondent. It is agreed that she was not sent job adverts until August 2020, and that this was in breach of its own maternity policy.

22. On 5th April 2021, a bank holiday, the claimant was sent a text message by Miss Herzig. It told her about a large number of changes to the workplace which had just taken place. Amongst other things it noted that Farrukh Syed had been appointed as her manager. Further, that Jenny Perkins had been appointed to a new post of Governance and Assurance Manager. We are satisfied that these were two opportunities for progression within the

company for the claimant. The latter was advertised internally with a formal job advertisement, posted on the company intranet. It was clear that this was, on any view, a job opportunity. In this regard, we think nothing turns on it being for a fixed term of 12 months.

23. So far as Mr Syed's appointment is concerned, we also find that this was a recruitment process. It may not have been as formal. However, it was a recruitment process in the sense that someone within the management structure identified Mr Syed as the most appropriate candidate, and approached him to ask if he was prepared to accept the position. It is not significant that it was a temporary position; nor that he was not given the title of business improvement manager. In this regard, we are satisfied that the respondent, has at times hidden behind a curtain of semantics. Mr Syed was asked to assume a proportion of the responsibilities previously carried out by the business improvement manager. We are satisfied that there was a significant overlap, although again it was difficult to properly assess the relative similarities of the roles.

24. The claimant was not happy about the text, and what she perceived to be a lack of communication from the respondent during her maternity leave. She commenced a grievance, heard by Mr Wilesmith. The grievance was not upheld. The claimant appealed, and this time the appeal was partially upheld on 28th June 2021. In summary, it was our view that the process as a whole was severely deficient, lacking in any proper and critical analysis of information submitted by the respondent. It was neither fair nor thorough.

25. In August 2021, the respondent began to send job adverts to the claimant. This included a re-advertisement of the Governance and Assurance Manager's post. It is the respondent's case that this represented the start of recruitment for the permanent role, due to commence in April 2022. We do not accept this. In our view it was window dressing, an attempt to disguise the perceived treatment that had gone before. It makes little sense that recruitment would have started that early for a post due to commence in 8 months. We have seen no objective evidence of a competitive process. We note that Miss Perkins, the current occupant, remained in post.

26. The claimant resigned by letter dated 31st August 2021. By a letter of the same day, the respondent accepted her resignation. There was no attempt by the respondent to change her mind, or to further investigate the motivation for her resignation. The claimant engaged in early conciliation between 26th June 2021 and 7th August 2021. She lodged her claim in the Employment Tribunal on 7th September 2021.

Decision

27. Based on the findings set out above, our decision was as follows. We make our decision based upon the agreed list of issues which appears at page 35 of the hearing bundle.

28. The claims were not time barred. We are satisfied that the claimant was not aware of the matters complained of until she received the text message on 5th April 2021. The clock started ticking at this point. The claim is therefore brought within time having regard to the early conciliation period. Even if we are wrong about this, we are satisfied that it would be just and equitable to extend time. No prejudice to the respondent was identified by Mr Sheehan arising out of the delay in bringing the claim. It is not clear when some of the acts of unfavourable treatment took place. It would be unjust and unfair in our view to deprive the claimant the opportunity of bringing these claims. It would, in effect, be rewarding the respondent for its failure to communicate these issues to the claimant, which in the context of this case would not be without irony.

29. The claimant has established a prima facile case of unfavourable treatment and detriment on the grounds of maternity. On the evidence there is something more here than simply unfavourable treatment, and the mere fact that claimant happened to be on maternity leave. Accordingly, we are satisfied that the burden of proof switches to the respondent to establish a non-discriminatory reason for its conduct in this case.

30. Addressing the list of issues at paragraphs 4-13, we are satisfied that the matters appearing in paragraph 4 are made out save for paragraphs 4.5 and 4.8. The latter was withdrawn by the claimant during the claimant's evidence. Further, there was no suggestion that the claimant perceived the appointment of Mrs Coole as an attempt to supplant her role. Therefore paragraph 4.5 is not made out on the evidence.

31. Dealing specifically with 4.1, we find that the obligation in this case was to notify the claimant of the sweeping changes to the organisation of the business at the same time (in the broadest sense) as other members of staff. This is the spirit of the legislation, and the respondent's own policy. The claimant clearly needed to know of the changes in order to be in a position to take advantage of the job opportunities that were created by the reorganisation. It was not sufficient to be told after the event. We note that Farrukh Syed, Jenny Perkins and Mrs Coole were all informed of the changes, and were therefore permitted to apply for new positions. The claimant was treated differently. They were all at work; she was on maternity leave.

32. In relation to paragraph 5 of the list of issues, we are satisfied that all of the matters found proved under paragraph 4 are examples of unfavourable treatment. The primary disadvantage here is that the claimant was barred from the opportunity of participating in any recruitment process, or the chance to compete with other applicants, and to progress her career. We did not find comparisons of the claimant's skills and experience with other staff to be helpful or necessary. It is sufficient in the context of this case that she was not given to opportunity to apply. This is clearly less favourable treatment and/or a detriment. In particular, the responsibilities taken on by Mr Syed were specifically valued by the respondent at £3,500 i.e. the extent of his pay rise upon taking on the extra responsibilities previously

undertaken by the business improvement manager, and to some degree, by the claimant.

33. We turn then to the question at paragraph 6, namely what was the reason for the unfavourable treatment so found. We are mindful that it is not enough that the claimant happened to be on maternity leave. It must be the reason for the treatment. We have adopted the legal structure set out in the respective written submissions. There appeared to be little if any dispute as to the legal tests that we should apply.

34. In this respect, the claimant established a prima facie case. The respondent has admitted to not complying with it own maternity policy in so far as it is relevant to this case. It has done so only at this hearing, whilst spending the previous 2 years seeking to deflect blame onto the claimant. She was deprived the opportunity to compete with Mr Syed and Miss Perkins in recruitment processes. They were at work whilst she was on maternity leave. The respondent's stated reasons for this apparently different treatment have been inconsistent and confusing. What is raised now is that there was an oversight or mistake on the part of human resources. Yet repeatedly in their witness statements, Miss Herzig and Mr Wilestone highlighted the fact that she was on maternity leave as the reason for the differing approach. It is our view that the content of paragraphs14 and 24 of Miss Herzig's statement, and paragraph 36 of Mr Wilestone's witness statement, are tantamount to admissions in respect of this aspect of the case.

35. Mr Sheehan submitted that we are in danger of placing too much significance on the content of witness statements; that it is unreasonable to scrutinise such language too closely; and that it risks adopting a counsel of perfection in respect of such documents. We do not agree. We have looked at the evidence in the round, and in context. It is quite clear to us that the said comments reveal an underlying attitude towards those on maternity leave, under-pinned by lazy and unfair assumptions on their part. For example, that those on maternity leave will insist on taking the full 12 months; that they cannot or will not consider returning early if circumstances dictate; that they should not be given the opportunity to make decisions for themselves about these issue; that they are less useful assets in the workplace; and less likely to by the solution to staffing problems where an 'immediate response' was required. We viewed the suggestion that the respondent had been concerned not to over-burden the claimant whist on maternity leave to be disingenuous, and an excuse developed after the event.

36. In arriving at the conclusion that a prima facie case was established, we also relied upon our findings relating to the way the grievances procedure was handled, which, as we have said, was neither thorough or fair. From this we infer a generally negative attitude towards the claimant, that she had been on maternity leave, and that she had raised a grievance as to her treatment under the maternity policy. It is remarkable how little regard the respondent had for its own policy, when the grievance was about its non-

compliance with the policy. Indeed, the transcript of the grievance meeting shows the claimant trying to focus on the maternity policy, and being disregarded when doing so.

37. The burden therefore switches to the respondent to provide a non-discriminatory explanation. The respondent, has in our view, singularly failed to rise to this challenge. At the heart of the case is the query as to why the respondent chose not to include the claimant in the processes alongside Mr Syed and/or Miss Perkins. We were told that these decisions were made at management or board level; that there would have been meetings to discuss the issue; and that there would be notes of these meetings. Yet we were told that neither witnesses for the respondent had referred back to these notes. Both claimed to now be unable to recollect the content of these discussions. There was no sign of these notes within the disclosed documents. The respondent's case is silent about it. It has left something of a hole in their evidence. The further point to be made here is that these were not simply mistakes in not sending adverts. These were strategic business decisions which were important to the respondent.

38. What is more is that they are curious decisions in our view. As Miss Herzig accepted in evidence, in relation to the technical aspects of responsibilities within the business improvement team, the claimant was a very strong employee and candidate for the role of business improvement manager (or the responsibilities previously assigned to that role). She accepted that the claimant had the technical skills and experience relevant to data analysis, which Mr Syed did not have. She was from within the team, and had been acting up in that role for several months prior to her maternity leave. Miss Herzig had previously encouraged her to seek promotion, potentially in a management role. Miss Herzig further conceded that she had not enquired as to the claimant's precise management experience. Why then exclude her completely from that recruitment process?

39. In our view, it is clear, that Miss Herzig's view of her as an effective and useful member of staff had been eroded by the knowledge that she had become pregnant and was on maternity leave. It may have been, in part, a subconscious attitude. Nonetheless, we are clear that it was the reason, or a significant part of the reason, for the unfavourable treatment. It is why she expressed herself as she did in her witness statement. We allow the claim under section 18th of the EA.

40. Turning then to the list of issues relevant to the claim under section 47(C) of the ERA. In the context of this case, it is a very similar claim. We rely upon all of the matters already set out in this decision. We find that paragraphs 8, 10, 11, and 12 made out as detriment in this case. For similar reasons as set out above when addressing paragraph 6 of the list of issues, we find that the reason for the detriment was the fact that the claimant was on maternity leave. We are satisfied that the claimant has established a prima facie case, and that the respondent has not established a non-discriminatory reason for the detriment on a balance of probabilities. We also allow the claim under section 47(C).

41. It was the Tribunal's intention to move on to the question of remedy. However, we are pleased to note that the parties came to an agreement as to the appropriate level of compensation in this case, having regard to our findings and decision. The respondent agreed to pay to the claimant the sum of £50,000.

Employment Judge R Wood

Date: 18th September 2023

Sent to the parties on:
21 September 2023

For the Tribunal Office